

The Lysistratian Prerogative: A Response to Stephen Pepper

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My overall assessment of Stephen Pepper's interesting and complex argument¹ may be summed up as follows:

I. Regarding his defense of the lawyer's amoral role: I disagree.

II. Regarding his claim that the existence of economic inequality does not vitiate the defense because to abdicate the amoral role "would compound inequality upon inequality—first the inequality of access to a lawyer, then the inequality of what law that particular lawyer will allow the client access to":² I disagree.

III. Regarding his argument that the adversary system need not figure large in the justification of the amoral role: I partially agree.

IV. Regarding the "problem of realism": I completely agree, and indeed I view this as the major contribution of Pepper's essay.

V. Regarding his canvassing of possible solutions to the problem: I agree, with a few minor qualifications.

These are the five sections of my response.

I

Abraham Lincoln once said to a client in his Springfield law practice:

Yes, we can doubtless gain your case for you; we can set a whole neighborhood at loggerheads; we can distress a widowed mother and her six fatherless children and thereby get you six hundred dollars to which you seem to have a legal claim, but which rightfully belongs, it appears to me, as much to the woman and her children as it does to you. You must remember that some things legally right are not morally right. We shall not take your case, but will give you a little advice for which we will charge you nothing. You seem to be a sprightly, energetic man; we would advise you to try your hand at making six hundred dollars in some other way.³

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1. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 A.B.F. Res. J 613.

2. Pepper at 620.

3. W. Herndon & J. Weik, *2 Herndon's Lincoln 345n.* (Chicago: Belford, Clarke & Co., 1899).

Lincoln seems to have taken “some things legally right are not morally right” to be an important truth. It shows that exercising one’s legal rights is not always morally acceptable. From that, Lincoln evidently concluded that helping someone exercise their legal rights is not always morally acceptable. And so, Lincoln rejected the lawyer’s amoral ethical role.

Pepper disagrees with this line of thinking, arguing instead that “[t]he lawyer is a good person in that he provides access to the law.”⁴ Pepper is not the first writer to urge that—despite Lincoln’s reminder that what is legally right need not be morally right—assisting people to do what is legally right is always morally right. Charles Fried and Alan Donagan have also argued that legal autonomy is good, and so helping people have their legal autonomy is good.⁵ But some things legally right are not morally right, and so in any such argument we must ask how the rabbit of moral justification manages to come out of the hat. And the answer, I believe, is the one we all expected: rabbits don’t come out of hats unless they have been put in the hats to begin with. Fried gets the rabbit in the hat by using an analogy of lawyers to friends that—as his critics pointed out⁶—begs the question. Donagan doesn’t quite get the rabbit out of the hat; he (rightly) imposes such stringent limitations on the amoral role that it would be unrecognizable to its champions. And Pepper, I believe, assumes that the morality is already in the law, that in an important sense anything legally right *is* morally right. That, however, cannot be, or so I wish to argue.

The argument for the amoral role goes as follows: *First premise*: “law is intended to be a public good which increases autonomy.”⁷ *Second Premise*: “autonomy [is] preferred over ‘right’ or ‘good’ conduct”;⁸ “increasing individual autonomy is morally good.”⁹ *Third premise*: “in a highly legalized society such as ours, . . . access to the law . . . in reality . . . is available only through a lawyer.”¹⁰ *Conclusion*: “what the lawyer does is a social good.”¹¹ “The lawyer is a good person in that he provides access to the law.”¹²

4. Pepper at 634.

5. See Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *Yale L.J.* 1060, 1073 (1976); Donagan, *Justifying Legal Practice in the Adversary System*, in D. Luban, ed., *The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics* 128-33 (Totowa, N.J.: Rowman & Allanheld, 1983).

6. Dauer & Leff, *Correspondence: The Lawyer as Friend*, 86 *Yale L.J.* 573, 577-78 (1977); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 29, 108-9; Postema, *Moral Responsibility in Professional Ethics*, 55 *N.Y.U.L. Rev.* 63 (1980).

7. Pepper at 617.

8. Pepper at 617.

9. Pepper at 617.

10. Pepper at 617. I have paraphrased Pepper’s use of premise 3 somewhat. He regards it as a premise concerning the role of access to law in realizing individual autonomy, a fact that implies that access to lawyers is essential. But phrased that way it overlaps with premise 1 in a somewhat confusing fashion: premise 1 says roughly that law is intended to be one way to increase autonomy—one sufficient condition for increasing autonomy—while premise 3 says that law will be a necessary condition for increasing autonomy.

11. Pepper at 617.

12. Pepper at 634.

I deny the second premise, that individual autonomy is preferred over right or good conduct: it is the point at which the rabbit gets into the hat. Pepper appears to have blurred the crucial distinction between *the desirability of people acting autonomously* and *the desirability of their autonomous act*. It is good, desirable, for me to make my own decisions about whether to lie to you; it is bad, undesirable, for me to lie to you. It is good that people act autonomously, that they make their own choices about what to do; what they choose to do, however, need not be good.¹³ Pepper's second premise is plausible only when we focus exclusively on the first of each of these pairs of propositions; it loses its plausibility when we turn our attention to the second. *Other things being equal*, Pepper is right that "increasing individual autonomy is morally good," but when the exercise of autonomy results in an immoral action, other things aren't equal. You must remember that some things autonomously done are not morally right.

Pepper's subsequent argument is that since exercising autonomy is good, helping people exercise autonomy is good. Though this is true, it too is only half the story. The other half is that since doing bad things is bad, helping people do bad things is bad. The two factors must be weighed against each other, and this Pepper does not do.

Compare this case: The automobile, by making it easier to get around, increases human autonomy; hence, other things being equal, it is morally good to repair the car of someone who is unable by himself to get it to run. But such considerations can hardly be invoked to defend the morality of fixing the getaway car of an armed robber, assuming that you know in advance what the purpose of the car is.¹⁴ The moral wrong of assisting the robber outweighs the abstract moral goodness of augmenting the robber's autonomy.

Pepper admits that it "may be morally wrong to manufacture or distribute cigarettes or alcohol, or to disinherit one's children for marrying outside the faith, but the generality of such decisions are left in the private realm."¹⁵ That is true, but that doesn't imply that such exercises of autonomy are morally acceptable. On the contrary, it concedes that they are immoral. And this is simply to return to the distinction between the desirability of exercising autonomy and the undesirability of exercising it wrongly.

13. I'm not sure what force Pepper intends by calling it a "social" good. To be a social good is not quite the same as to be a moral good, since social goods—things that are good for a society—can be morally unacceptable. (Example: It was good for Spanish society that the conquistadores plundered the Inca Empire, but it was also immoral. "What the conquistadores did was socially good" is true, but so is "what the conquistadores did was immoral.") I shall assume that Pepper means "moral good," not "social good."

14. Pepper analogizes using the law to driving a car at 623-24. It may be objected that armed robbery is illegal, so my analogy begs the question. In that case, you may supply your own example of something that is immoral but not illegal. But in any case, the point of Pepper's analogy is that lawyers, knowing how to manipulate the law, can help people get away with things that would otherwise be (found to be) illegal; so the analogy in the text is a good one.

15. Pepper at 617.

Pepper sees this. To make his argument work, he distinguishes between (merely) *immoral* conduct and *intolerable* conduct, and says that intolerable conduct “ought to be made explicitly unlawful”;¹⁶ at one point, indeed, he equates “not unlawful” conduct with conduct “above the floor of the intolerable.”¹⁷ Using this distinction, he argues in effect that unlawful conduct *is* conduct the immorality of which does not outweigh the value of autonomous decision making. If we didn’t want people to make up their own minds about such conduct, we would make it illegal, and thus the fact that we haven’t shows that we do not disapprove of it sufficiently to take the decision out of people’s own hands.

The conclusion does not follow, however. There are many reasons for not prohibiting conduct besides the reason that we don’t think it’s bad enough to take it out of people’s hands. We should not put into effect prohibitions that are unenforceable, or that are enforceable only at enormous cost, or through unacceptably or disproportionately invasive means. We should not prohibit immoral conduct if it would be too difficult to specify the conduct, or if the laws would of necessity be vague or either over- or underinclusive, or if enforcement would destroy our liberties.

All these are familiar and good reasons for refraining from prohibiting conduct that have nothing whatever to do with the intensity of our disapprobation of the conduct. It is illegal to smuggle a bottle of nonduty-free Scotch into the country. It is not illegal to seduce someone through honey-tongued romancing, maliciously intending to break the lover’s heart afterward (as in Kierkegaard’s *Diary of a Seducer*). Surely this discrepancy does not show that we judge the smuggling (but not the seduction) “intolerable,” or even that we judge the smuggling to be morally worse than the seduction. On the contrary, we judge the seduction to be worse conduct, perhaps even intolerable conduct, but we realize that prohibiting seductions would have obvious enormous social costs. The distinction between legal and illegal conduct simply does not correspond to the distinction between conduct that we think on moral grounds people should be free to engage in and conduct we find morally intolerable.

Pepper acknowledges this too, but resists its implication by posing this rhetorical question: “If making the conduct unlawful is too onerous because the law would be too vague, or it is too difficult to identify the conduct in advance, or there is not sufficient social or political concern, do we intend to delegate to the individual lawyer the authority for case-by-case legislation and policing?”¹⁸

I do not treat this question as rhetorical; I answer it “yes.” The reason goes, I think, to the heart of my disagreement with Pepper. What bothers Pepper the most, I believe, is the idea that lawyers should interpose them-

16. Pepper at 618.

17. Pepper at 617.

18. Pepper at 618.

selves and their moral concerns as “filters” of what legally permissible projects clients should be able to undertake. His concern, in turn, appears to have two aspects to it, one specific to lawyers, the other more general: “Such a screening submits each to . . . rule by oligarchy of lawyers.”¹⁹ More generally, it appears to me that Pepper objects to *anyone*, lawyer or not, interposing his or her scruples to filter the legally permissible projects of autonomous agents. He objects, that is, to informal obstacles to autonomy, allowing only the formal obstacles raised by the law itself. (That seems to be the force of his argument that any conduct which is not illegal is up to “individual decision making.”²⁰) I suspect that part of Pepper’s worry here is that to allow informal obstacles to autonomy is to take away people’s first-class citizenship as granted by the law and thus to threaten the rule of law itself.

The first of these worries is illusory, for there is no oligarchy of lawyers, actual or potential, to worry about. An oligarchy is a group of people ruling *in concert*, whereas lawyers who refuse to execute projects to which they object on moral grounds will do so as individuals, without deliberating collectively with other lawyers. The worry about a hidden Central Committee of lawyers evaporates when we realize that the committee will never hold a meeting, and that its members don’t even know they are on it.²¹ An analogy will clarify this. No doubt throughout history people have often been dissuaded from undertaking immoral projects by the anger, threats, and uncooperativeness of their spouses. It would scarcely make sense, however, to worry that this amounts to subjecting autonomous action “to rule by an oligarchy of spouses.” There *is* no oligarchy of spouses.

The second worry is more interesting. Unlike Pepper, I am not troubled by the existence of informal filters of people’s legally permissible projects. Far from seeing these as a threat to the rule of law, I regard them as essential to its very existence.

We—people, that is—are tempted to a vast array of reprehensible conduct. Some of it can be and is tolerated; some of it we do not engage in because of our scruples; and some of it the law proscribes. But the law cannot proscribe all intolerable conduct, for human society would then be crushed flat by a monstrous, incomprehensible mass of law. And scruples—conscience, morality—will not take up all the slack.

Instead, we rely to a vast extent on informal social pressure to keep us in check. Why do people break into the line at the cafeteria so seldom? Why do they bus their own trays? Why do they keep malicious, gossiping tongues in (relative!) check at the office? Why are they civil to subordinate employees? Why do they keep their word? Why are Kierkegaardian seduc-

19. Pepper at 617.

20. *Id.*

21. This argument is made in A. Goldman, *The Moral Foundations of Professional Ethics* 128–30 (Totowa, N.J.: Rowman & Littlefield, 1981).

ers few and far between? For many people, the answer is scruples, morality; but for many people it is not. When conscience is too faint, I submit, the answer to all these questions is that people worry about what other people will say, think, and do, and guide their behavior accordingly.

Imagine now what would happen if we could no longer count on this sort of motivation, so that we would have to enforce desirable behavior legally—imprison or fine line-skippers and tray-nonbussers, gossips and rude deans and heartbreakers. Imagine policing these offenses! When we begin to reflect on the sheer magnitude of altruistic behavior we take for granted in day-to-day life, we realize that society could not exist without the dense network of informal filters provided by other people.

Among those filters is noncooperation. Many nefarious schemes are aborted because an agent's associates or partners or friends or family or financial backers or employees will have nothing to do with them.²² My argument is that far from this being an objectionable state of affairs, neither society nor law could survive without such filters.

And, to conclude the argument, I do not see why a lawyer's decision not to assist a client in a scheme that the lawyer finds nefarious is any different from these other instances of social control through private noncooperation. It is no more an affront to the client's autonomy for the lawyer to refuse to assist in the scheme than it is for the client's wife to threaten to move out if he goes ahead with it. Indeed, the lawyer's autonomy allows him to exercise the "Lysistratian prerogative"—to withhold services from those of whose projects he disapproves, to decide not to go to bed with clients who want to "set a whole neighborhood at loggerheads."

Pepper wants to allow the lawyer's autonomy a narrower scope: to refrain from being a lawyer, to engage in moral dialogue with clients, to decline to represent a client, and in extreme cases to engage in conscientious objection against odious professional obligations.²³ The last two of these together add up to the Lysistratian prerogative, except for Pepper's limitation of conscientious objection to extreme cases. He includes this limitation because he thinks that only extremely objectionable actions outweigh the value of enhancing client autonomy. I believe, however, that in almost every case of significant client immorality the good of helping the client realize his autonomy will be outweighed by the bad of the immoral action the client proposes. The argument for this point will complete my response to Pepper's defense of the amoral role.

Autonomous decision making is valuable for two complementary reasons: metaphysically and axiologically, the exercise of freedom is one of the most important (if not the most important) components of human well-

22. Often the agent knows in advance that this will be so, and therefore abandons the scheme without even giving it serious consideration. The agent may then believe that he had not really contemplated the scheme, just had it cross his mind for a moment—and in a sense he is right. But in another sense, this fact was itself a product of informal obstacles posed by other people.

23. Pepper at 634–35.

being; and psychologically, the exercise of freedom is developed in tandem with prized traits of character: rationality and prudence, adult commitment, self-actualization, and responsibility.

It is crucial to realize, however, that none of these values require *unlimited* autonomy in order to be satisfactorily realized—if they did, of course, then human autonomy would be incompatible with the very existence of law. This fact in turn implies that occasional or limited impositions pose no threat to the values underlying my autonomy, provided that my life contains plenty of other opportunities for developing and exercising the capacities associated with autonomous decision making—provided, in other words, that my life is by and large autonomous. A parent's autonomy is not jeopardized because her lawyer refuses to draft a will disinheriting her child because of the child's opposition to the war in Nicaragua:²⁴ the parent still has plenty of other opportunities for free decision making (indeed, the parent probably even has plenty of other opportunities to make her child miserable). Her life is by and large autonomous.

And, since lawyers' interactions with clients are mostly occasional, lawyers' refusal to execute immoral designs of clients will not threaten the values underlying autonomy if the clients' lives are by and large autonomous in their other interactions. For this reason, in cases of conflict the threat to autonomy posed by Lincoln-like lawyers will typically be outweighed by the immorality of helping the clients.

In effect, Pepper has argued for a strong and a weak thesis. The strong thesis is that helping clients, even when they are doing bad, is good. The weak thesis is that withholding help from clients is bad. But both arguments fall: the rabbits came out of the hat only because they were waiting there to begin with.

II

What about the "economic inequality criticism"? Pepper puts his reply to it nicely when he distinguishes two issues: "the distribution of legal services and the content of what is distributed."²⁵ He agrees that our current distribution of legal services is far from desirable but denies that this alters the moral standing of the content of what is distributed. I disagree.

The problem is that the content of what is distributed is *on Pepper's own account of the matter* partly a comparative good: first-class citizenship. It is comparative because its value is partly defined relative to other people's holdings of it—first class is first class only relative to second class. In this respect it is like a number at a "take-a-number" deli counter, the value of which is determined solely by how many people have lower numbers. Moreover, to give first-class citizenship selectively to some people is tanta-

24. Pepper's example, at 618, drawn from Wasserstrom, *Lawyers as Professionals: Some Moral Problems*, 5 *Hum. Rts.* 1, 7 (1975).

25. Pepper at 619.

mount to bumping everyone else down one class: those who were first-class citizens are now second-class citizens, those who were second-class citizens—if such there were—are now third-class, and so on.

These facts are relevant because they undercut the case for saying that giving first-class citizenship to some but not all people is good—not as good as giving it to all, but better than giving it to none, or to fewer. That case, I take it, is simply that Pareto improvements—distributional moves in which some people are helped and no one is hurt—are good. The comparative character of first-class citizenship, however, means that those who don't have it *are* hurt by others having it, as I am hurt if the deli manager gives his friends tickets with lower numbers than mine.

This becomes apparent when we look at the components of first-class citizenship that Pepper inventories. First-class citizenship makes available, among many other benefits, the “corporate form of enterprise, the contract, the trust, the will, and access to civil court to gain the use of public force for the settlement of private grievance.”²⁶ As he notes, all are “vehicles of empowerment for the individual or group.”²⁷ That is, the components of first-class citizenship allow you to leverage yourself into a better position (economic or otherwise) than those who don't have them. The resulting competitive advantage in turn give you further leverage to augment your position still more. And, insofar as the socioeconomic game is zero-sum—it isn't always, but it is often—the more the rich get richer, the more the poor get poorer. Finally, your augmented position will get you the influence and power to push for rule changes that further enhance the packet of perks accruing to first-class citizens.

In this way, the differential granting of first-class citizens yields a self-producing vicious spiral of social inequality and outright damage to those who don't have it. The problem is that when first-class citizenship is not universally available, its components are not mere *benefits*; they are *advantages*. Conferring benefits selectively can be a Pareto improvement, but conferring advantages is not, and I don't believe that it is good.

Am I arguing, then, that if everyone can't have first-class citizenship no one should? I believe I am. Lest this seem outrageous, let me present an analogous case. Let our society be as it is now, with second-class citizens—those who, because they can't afford lawyers, have no access to the law—and first-class citizens. Suppose the administration (in a fit of supply-side enthusiasm) proposes a bill to create a new, exclusive, very special kind of citizenship—“executive class citizenship.” It contains all the perks of first-class citizenship plus a few others: dandy new tax shelters, first-refusal mineral rights in the national wildernesses, no-wait federal courts unavailable to anyone else, diplomatic passports. Executive class citizenship is

26. Pepper at 616.

27. *Id.*

awarded to all and only those Americans in the top 1% of individual income.

Would you support the bill? Or would you say, as I would, that *if everyone can't have executive-class citizenship no one should?*²⁸

III

I agree with Pepper that his first-class citizenship theory of lawyers' ethics, which models the activity of the office lawyer rather well, is better than an adversary-system-based theory, which models the activity of the trial lawyer rather well. This is for the obvious reason that there are many more office lawyers than trial lawyers. I nevertheless believe that the adversary system must still figure prominently in the debate, because so many of the morally disturbing behaviors in legal practice grew up in the shadow of the courtroom and thus in the shadow of the adversary system. This affects even office law practice, in at least three ways.

1. Because of the adversary system, American lawyers are socialized into a "hardball culture" that necessarily affects even office practice. Lawyers are accustomed to discount the interests of nonclients to an extent that I believe is inexplicable without referring to the adversary system.

2. Deal making and document drafting, the paradigmatic office lawyering activities, must be done with the worst-case scenarios in mind, and these are scenarios of breakdown and litigation. The more adversarial the litigation practices are in a legal culture, the more cautious and complicated and fail-safe their anticipatory moves must be. This is true even of counseling: Consider how much a tax lawyer's advice on recordkeeping and creative accounting is colored by the level of adversariality adopted by the IRS.

3. Ethical rules that are unusual from the point of view of ordinary morality, such as the rules governing disclosures of confidential information to prevent clients from wrongdoing, are fashioned according to arguments based on the adversary systems. It was, after all, the trial lawyers, using arguments of Professor Freedman,²⁹ who succeeded in weakening the disclosure provisions in the Model Rules of Professional Conduct. The arguments invoked had to do with the exigencies of the adversary system, and thus they apply preeminently to courtroom lawyers, but the disclosure rules finally adopted govern office lawyers as well. The point is that the adver-

28. This argument needs one qualification, which does not affect it in the present context. Before one can conclude that no one should have first-class citizenship unless everyone does, one must know how bad second-class citizenship is. In a society in which second-class citizenship means that even basic human rights are not honored, while first-class citizenship means that they are, it would be immoral to suggest taking first-class citizenship away from anyone, even though it is available only to a few. I assume that this is not the case in the United States, where second-class citizenship (no money for legal assistance) need not imply great poverty or lack of the human minimum. (Poverty is more like third-class citizenship; "only" 14% of Americans are third-class citizens.)

29. M. Freedman, *Lawyers' Ethics in an Adversary System* ch. 1 (Indianapolis: Bobbs-Merrill, 1976).

sary system shapes the rules, and the rules shape even nonadversarial law practice.

IV

The morally pernicious effect of "legal realism" is a splendid discovery of Pepper's. He brings it up as an untoward consequence of his own defense of the amoral role, and by doing so provides us with a more clear-headed understanding of how that role can be perverted than have any of its previous defenders. In the terms of Pepper's own defense of the amoral role, the problem may be analyzed as a fundamental difference in understanding of the law between the defender and the realist. As we have seen, Pepper's defense assumes that the law itself reflects a society's moral beliefs and the relative intensities of its moral judgments. The legal realist, on the other hand, is a moral skeptic about the law, who has bathed its clauses in cynical acid until all encrustations of morality have been dissolved. The result, as Pepper notes, is that "there is no moral input or constraint in the present model of the lawyer-client relationship."³⁰

One response to this problem would be to argue that if realism is true, the defense of the amoral role fails. I shall not pursue this response, however, since I have argued that the defense fails in any event. A second response is to argue against realism, or at least realism in its most skeptical temper. That, I believe, is a better way.³¹

I would like to argue that there are two versions of "legal realism": one, which I will call High Realism, is an important philosophy of law; the other, which I will call Low Realism, amounts to skepticism about law, and is no more a philosophy of law than "what's right is whatever you can get away with" is a philosophy of ethics. In fact, Low Realism does amount to "what's right is whatever you can get away with." Unfortunately, what Pepper calls the "legal realist lawyer"³² is an adherent of Low Realism.

Low Realism is the claim that law is "a prediction of what human officials will do."³³ High Realism is the claim that law is a prediction of what human officials will do *in their good faith efforts to interpret and enforce authoritative rules*. High Realism is an interesting and important philosophy of law for two reasons: first, it is a reasonable (though, I think, false) reductivist attempt to explain the connection between law and human behavior; second, it raises important questions about what counts as a good

30. Pepper at 626 (emphasis omitted).

31. The argument that follows is one which I have developed in more detail in Luban, *Fish v. Fish* or, *Some Realism About Idealism*, 7 *Cardozo L. Rev.* 693, 697-700 (1986).

32. Pepper at 628.

33. Pepper at 625. Classic statements of this thesis are Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"), and Cohen, *The Problems of a Functional Jurisprudence*, 1 *Mod. L. Rev.* 5, 16 (1937) ("any . . . legal question may be broken up into a number of subordinate questions, each of which refers to the actual behavior of the courts. . . . The law, as the realistic lawyer uses the term, is the body of answers to such questions").

faith effort to interpret authoritative rules. High Realism will embrace many alternative theories depending on how it answers these questions; even Ronald Dworkin is a type of High Realist.

Low Realism, on the other hand, smothers interesting questions about what law is, rather than raising them. By omitting the "good faith interpretation" restriction in High Realism, Low Realism implies that reckless driving is not illegal in Chicago if you can get the famous "writ of fixitus" from Judge Greylord; bribing Judge Greylord is not illegal if you can also bribe the FBI agents and the U.S. Attorney investigating him; bribing the investigators is not illegal if they can intimidate the witnesses into not testifying; and so forth. You may be in for a fall, but there are cities in which you can get away with such pursuits for decades, maybe for your entire life. And, according to Low Realism, as long as the relevant officials will not sanction you, you have *by definition* committed no infraction of the law. A closed circle of corruption, if it is large enough, is the law itself. Similarly, Low Realism implies that homicide is not murder if you can convincingly frame someone else—in other words, that killing is legal if you don't get caught or if a jury would not convict you.

Confronted with implications like these, our first reaction is to deny indignantly that anyone in the profession (except perhaps Mafia lawyers) adheres to Low Realism; but our first reaction is wrong. Pepper's example of lawyers counseling an industrial client that antipollution standards are rarely enforced and therefore need not be complied with³⁴ is no different at all from counseling a client that the law against murder need not be complied with if the client can avoid getting caught. And lawyers do the former kind of counseling all the time.³⁵

As I have said, Low Realism is tantamount to the view that "what's right (=what's legal) is whatever you can get away with (=what officials will let you get away with)." Low Realism drains law of its normative content, as Pepper acutely remarks. Small wonder, then, that if the Low Realist lawyer adopts the amoral role defended by Pepper, which blocks the entry of extralegal normative content into the lawyer's practice, the result is not pretty to contemplate. Part of the intellectual problem disappears if you agree with me that the amoral role is not defensible; even if you don't, however, the rest of it can be defanged if you agree with me that Low Realism is a serious mistake.

As a practical insight, Low Realism is simply an elaboration of the tautology "You can get away with what you can get away with." As a theoret-

34. Pepper at 627-28.

35. Another example: Kenneth Mann, in his excellent book *Defending White-Collar Crime: A Portrait of Attorneys at Work* (New Haven, Conn.: Yale University Press, 1985), quotes a Manhattan white-collar criminal defense attorney's explanation of why he would never blow the whistle on clients planning future crimes: "That's not a crime until the government gets a conviction in court, and as long as that has not happened there is no crime there, as far as I have to conclude." *Id.* at 115. From this, of course, it follows that there is no such thing as a future crime. Perhaps we should call this Low Low Realism.

ical insight, Low Realism is at best a misunderstanding of High Realism and at worst a raspberry in the direction of the law. Combined, the theoretical and practical bases of Low Realism blend the compelling force of tautology with the respectability of the serious philosophical position that Low Realism vulgarizes,³⁶ and thus convince its adherents that they have Discovered a Deep Truth About Law. (That, in my experience, is how Low Realism is phenomenologically appropriated by second-year law students and jaded professors.)

I deny that they have discovered anything other than the simple fact that ruthless amorality can succeed. For, as the Greylord example shows, it is an implication of Low Realism that nothing whatsoever is illegal if you are able to get the officials to go along with you by any means at all. Furthermore, there can be no such things as illegal means for getting officials to go along with you—neither bribes, nor threats, nor outright assassinations are illegal—provided that you can get the officials to go along with you about the nonsanctionability of the means you have used. Low Realist principle cannot preclude using bribery to get officials to go along with the legality of bribing them.³⁷ In short, success in getting officials to do what you want *in itself* entails the legality of what you want. Legality as a category simply drops out of the picture. Its place is taken by a different concept: winning. Low Realism identifies law with victor's spoils.

When we realize this, we realize that while the problem Pepper raises is of enormous practical importance, it arises only because a theoretically negligible position—Low Realism—has come to be believed and lived by many lawyers. But the position is no less theoretically negligible for all that.

I cannot, however, resist pointing out that the amoral ethical role Pepper defends contributes to the prevalence of Low Realism. When getting the client whatever he or she wants is conceived of as the lawyer's preponderant professional obligation, it is psychologically natural to reduce the dissonance between that obligation and legality by understanding the law as *whatever I can get officials to give my client*. That understanding is Low Realism. To put it another way: If you think winning is the most important thing, you will eventually think winning is the only thing. Take the normative content out of the lawyer's role and the lawyer will feel impelled to take the normative content out of law as well and define it Low Realistically as victor's spoils pure and simple.

36. For a discussion of this serious position, see R. S. Summers, *Instrumentalism and American Legal Theory* (Ithaca, N.Y.: Cornell University Press, 1982).

37. Notice that High Realism is very different: no official who takes a bribe can believe in good faith that bribe taking is legal, and thus according to High Realism bribe taking cannot be legal.

V

My comments on section IV of Pepper's essay are quite brief.³⁸ The responses to the problem he canvasses do seem to me to be the right ones. I myself sympathize most with the "moral dialogue" approach, which can be used in tandem with any of the others and should always constitute a lawyer's first step. That is, before a lawyer should consider conscientious objection, say, by blowing the whistle on a client, the lawyer should engage in moral dialogue with the client in order to change his or her purposes. My main criticism of this section is that I think that the difference between Pepper's section IV.C, the lawyer as judge—which Pepper rejects—and section IV.E, conscientious objection—which Pepper accepts—is more a matter of degree than kind. And, for reasons that I detailed at the end of section I, I see the difference in degree as being much slighter than Pepper does, so that in the end I assimilate C to E. Since (in my view) his reasons for accepting E are good ones, I think he should accept C as well.

38. One small point: on page 633. Pepper says (discussing the hidden bodies case), "Professor Luban's approach implies that normal morality should have been applied by the lawyers" (i.e., they should have revealed where the bodies were hidden). I have it on the best of authority that Luban thinks the opposite. He distinguishes the hidden bodies case from the fact situation of *Spaulding v. Zimmerman*, 116 N.W.2d 704 (1962) (in which a personal injury defense lawyer kept confidential the fact—known to him through a physician's report but not known to the plaintiff—that the plaintiff had a potentially fatal aortic aneurism). Luban says that, unlike the hidden bodies case, here there is no strong reason for the lawyer to keep the confidence, thereby implying (if I read him aright) that there *is* strong reason to keep confidential the knowledge of where the bodies are hidden. Luban, *The Adversary System Excuse*, in Luban, *supra* note 5, at 114-15 (1983).

